No. 16,556

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN D. DUNCAN,
Appellant,

vs.

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE

LYNN J. GILLARD,
United States Attorney,
JOHN KAPLAN,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

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JURISDICTION

Jurisdiction is founded under Title 28 United States Code, Section 253.

STATEMENT OF THE CASE

On September 14, 1955, appellant began the service of a 2 to 4 year sentence in the prison system of the State of Maine for the state crime of breaking and entering. While under service of this sentence, appellant attempted to escape from the Maine State Prison and for this crime was sentenced on October 10, 1956 to 8 to 16 years consecutively to the previous sentence.

On May 22, 1957, pursuant to a contract between the State of Maine and the United States government

and in accordance with the terms of Title 18 United States Code Section 5003 (see Appendix I) appellant was transferred to the United States Penitentiary at Alcatraz. From there he sought habeas corpus in a petition filed on May 5, 1959.

On May 12, 1959, this petition was denied and on July 23, 1959, appellant was granted leave to appeal in forma pauperis.

ARGUMENT

I

Appellant's primary argument is that Section 5003 does not authorize the imprisonment of other than youthful offenders by the federal government. In answer to this it should be noted that codification of the Act under Part 14 of Title 18, Correction of Youthful Offenders, does not mean that the Act is inapplicable to other offenders. The title of the Act itself furnishes the pertinent phraseology as to its purpose. It is "An act to authorize the Attorney General to admit persons committed by state courts to Federal *penal* and correctional institutions when facilities are available." (Emphasis added.) Of necessity the codification of legislative acts sometimes seems to "pigeon-hole" a statute which by its very terms applies to multiple situations and categories. Thus PL 865, 85th Cong., 1st Sess. (1950), was entitled, "An act to provide a system for the treatment and rehabilitation of youth offenders, to improve the administration of criminal justice, and for other pur-

poses." Sec. 4 of that Act, which provides for an Advisory Corrections Council, is codified as 18 U.S.C. 5002 (under Youth Offenders) even though it is obviously not confined to this category. In 1952 the present section 5003 was added. Like 5002, while it is applicable to youthful offenders it is not confined to that classification. Another illustration is a new section, 4209, which is made part of Chapter 311, captioned *Parole,* although 4209 raises age of youth offenders from 22 to 26.

Determinative of this issue is the statement on page 3188, Title 18 of the United States Code, 1958 ed. Sec. 18 of the Act of June 25, 1948, ch. 645, 62 Stat. 862, provided that: "No inference of a legislative construction is to be drawn by reason of the chapter in Title 18, Crimes and Criminal Procedure, as set out in section 1 of this Act, in which any particular section is placed, nor by reason of the catchlines used in such title." The Act of June 25, 1948 codified and enacted into positive law Title 18. Later, in 1952, section 5003 was added.

House and Senate reports on the legislation in question, cited by appellant, indicate that the usual request from a state for federal custody of a state prisoner relates to juveniles and drug addicts. Obviously a drug addict is not necessarily a youth offender and Congress therefore definitely considered the Act as applicable to other than youthful offenders. The explanation of "treatment" in the House Report (cited by appellant) does not limit the term to medical treatment or treatment under the Youth Corrections

Act. The term "treatment" is in fact used in a number of statutes codified under Part III of Title 18, Prisons and Prisoners. Thus 18 U.S.C. 4081 reads:

> "Sec. 4081. Classification and *treatment* of prisoners.
>
> The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and *treatment* of the persons committed to such institutions. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 859.)" (Emphasis added.)

While not specifically referred to as treatment, the rehabilitation process afforded by prison industries (18 U.S.C. 4121 ff), is certainly a type of "treatment" for prisoners. (And cf. 18 U.S.C. 4001, which provides that the Attorney General may establish industries and provide for treatment.)

Finally, it is significant that the Senate Report on the bill (S. 2160) which became 18 U.S.C. 5003 does not include the above-mentioned explanation as to treatment nor did the comments of the Deputy Attorney General on this Department-sponsored bill show any intent to limit the provisions to youth offenders. (See letter from Deputy Attorney General quoted in House and Senate Reports.) On the con-

trary, the approach was one of reciprocity—*i.e.,* the legislation was intended to provide the same service for state prisoners which states provide, under 18 U.S.C. 4002, for federal prisoners.

II

Appellant's second argument involves the constitutionality of Section 5003 of Title 18 U.S.C. Appellant states that the federal government is a government of limited and enumerated powers. Appellant then argues that since the provision for the boarding of state prisoners in federal prisons is not in pursuance of any of the powers granted in Article I Section 8 of the Constitution, Section 5003 of Title 18 is an invasion of the state police power and the reserve powers of the states.

A complete answer to this question is found in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288. There the Court rejected similar arguments as concerning a contract for the sale of electric power, stating that:

> "Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress by Section 3 of Article IV of the Constitution. This Section provides:
>
> 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.'

> "To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable. . . ." 297 U.S. at 330.

III

Appellant also complains that he is denied the equal protection of the laws by the state of Maine, in that the statutes of Maine, under which his imprisonment in Alcatraz was contracted for, give the Maine authorities the latitude to deny persons the equal protection of the laws. The essence of the complaint here is that the warden may, but does not have to certify on persons who are detrimental or incorrigible to be transferred to federal custody.

First of all, it would seem that this objection assumes a construction of the state of Maine statutes. It is the state Courts which have the first and last word as to the meaning of state statutes and the Supreme Court has indicated its disapproval of the anticipatory declarations involving state statutes.

Public Service Commission v. Wycoff, 344 U. S. 237, 247;

Alabama State Federation of Labor v. McAdory, 325 U. S. 450.

Furthermore it would seem that any complaint by the appellant concerning the denial of equal protection of the laws would have to show some discriminatory application of this statute. On its face, the classification of detrimental or incorrigible persons is reasonable and logical and the discretion granted the warden in determining which prisoners to transfer is

in line with the necessities and realities of prison administration. As such it clearly does not run afoul of the equal protection clause.

Appellant's further arguments concerning his "banishment" are unrealistic under the facts of this case. Appellant merely is being transferred to an institution better able to handle discipline problems such as himself. Even though the institution happens to be out of his state, appellant cannot claim a constitutional right to be imprisoned in an area of his own choosing. Certainly, appellant cannot force the state of Maine to build and maintain a maximum security institution for himself and the very few others who require that type of incarceration.

A similar contention made by a state of Maine prisoner imprisoned in a federal penitentiary in Pennsylvania was rejected by the District Court in an unpublished opinion. (See App. II.)

Accordingly, the judgment of the United States District Court should be affirmed.

Dated, San Francisco, California,
October 27, 1959.

Respectfully submitted,

LYNN J. GILLARD,
United States Attorney,

JOHN KAPLAN,
Assistant United States Attorney,

Attorneys for Appellee.

(Appendices I and II Follow.)

Appendices.

Appendix I

(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided,* That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

(b) Funds received under such contract may be deposited in the Treasury to the credit of the appropriation or appropriations from which the payments for such service were originally made.

(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

T. 18 U.S.C. Sec. 5003 (a)(b)(c).

Appendix II

United States District Court
For the Middle District of Pennsylvania
Habeas Corpus No. 349

Thomas Pratt,
Petitioner,
vs.
Charles R. Hagan, Warden United States Penitentiary, Lewisburg, Pennsylvania,
Respondent.

MEMORANDUM

Thomas Pratt, a prisoner of the State of Maine, was transferred from the Maine State Prison to a federal penal institution in this district, namely, the United States Penitentiary, Lewisburg, Pennsylvania. This was done pursuant to the Act of May 9, 1952 (18 U.S.C. § 5003) which provides, inter alia:

> "(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided,* That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved."

He now seeks, in forma pauperis, the issuance of a writ of habeas corpus. His contention is that an agreement such as provided by the Act is a "direct violation of your petitioner's Constitutional Rights," that he "did not sign any extradition papers," and that "Your petitioner did not commit a Federal Violation, therefore, your petitioner is being held in a Federal Penitentiary illegally."

The analogous or possibly more aptly termed "converse" situation is that of placing federal prisoners in State institutions where the State has expressed a similar willingness to accept. In 72 C.J.S. Prisons § 3, under the caption "Use by United States of State Prison or County Jail," it is stated:

> "In response to a recommendation embodied in an early resolution of congress various states have made it the duty of their officers to receive and keep in the state or county prisons any prisoners committed thereto by process or order issued under the authority of the United States, as though they had been committed under the authority of the state, provision having been made by the United States for the support of such prisoners; * * *."

In 1815, Justice Story in Randolph v. Donaldson, 13 U.S. 75 (9 Cranch 75), pointed out that

> "Congress, by a resolution passed the 23d September 1789 (1 U.S. Stat. 96), recommended to the several states to pass laws making it the duty of the keepers of their jails to receive and safe keep prisoners committed under the authority of the United States, * * *. In pursuance of the

> former recommendation, the legislature of Virginia, by the act of 12th November 1789, ch. 41 (Revised Code 43), made it the duty of the keepers of the jails within the state, to receive and keep prisoners arrested under the process of the United States, * * *.",

and in the opinion found no objection to such an arrangement nor did he express any doubt as to its constitutionality.

In the legislative history,[1] prior to the passage of the Act of 1952, House Report No. 1663, stated, inter alia:

> "The Committee on the Judiciary, to whom was referred the bill (S. 2160) to authorize the Attorney General to admit persons committed by State courts to Federal penal and correctional institutions when facilities are available, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.
>
> "The purpose of the proposed legislation is to authorize the Attorney General, when Federal facilities are available, to contract with State and Territorial officials for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such States and Territories.
>
> * * * * *
>
> "State prisons for many years housed and cared for Federal prisoners—until the Federal Government built its own institutions. Today, by

[1] 1952 U.S. Code Congressional and Administrative News, Page 1420.

statute, (sec. 4002, title 18, U.S.C.) the Attorney General is authorized to contract with State officials for the care and custody of our Federal prisoners. Pursuant to this authority, there were on August 31, 1951, approximately 3,000 Federal prisoners serving short sentences or awaiting trial in State, county, and Federal institutions. The committee sees no reason why Federal facilities and personnel should not, in turn, be made available for State offenders, provided, of course, the Federal Government is reimbursed for any expenses involved. * * *."

The Act of 1952, as can be clearly seen from the historical background, provided for nothing unusual and in no sense constituted any invasion of the rights of prisoners. The constitutionality of such legislation is no longer open to doubt.

The petition for writ of habeas corpus will accordingly be denied.

July 10, 1959.

/s/ Frederick V. Folmer,
United States District Judge.

ORDER

NOW, to wit, July 10, 1959, for the reasons set forth in the foregoing Memorandum, the petition of Thomas Pratt for writ of habeas corpus is accordingly denied, and the Rule to Show Cause issued thereon is discharged.

/s/ Frederick V. Follmer,
United States District Judge.